INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	3
Argument	4
Conclusion	8

CITATIONS

Cases:	
Costner v. *United States*, 139 F. 2d 429	5
Dimmick v. *Tompkins*, 194 U. S. 540	6
Dunn v. *United States*, 284 U. S. 390	6
Hood v. *United States*, 43 F. 2d 353	6
Lucas v. *United States*, 158 F. 2d 865, certiorari denied, 330 U. S. 841	7
Rowan v. *United States*, 281 Fed. 137, certiorari denied 260 U. S. 721	5
Statute:	
Criminal Code, Sec. 197 (18 U. S. C. (1946 ed.) 320, now 18 U. S. C. 2114)	2
Miscellaneous:	
Rules of Criminal Procedure; Rule 52 (a)	6

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 263

JOSEPH F. BENT AND WILLIAM AMOS JONES,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 14–23) is reported at 175 F. 2d 397.

JURISDICTION

The judgment of the Court of Appeals was entered June 20, 1949 (R. 23–24), and a petition for rehearing (R. 25–30) was denied July 14, 1949 (R. 31). The petition for a writ of certiorari was filed August 13, 1949. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTION PRESENTED

Whether the deficiency in the second count of the indictment, under which petitioners were sentenced to the mandatory penalty of 25 years' imprisonment, in failing to reallege the principal element of the offense charged in both the first and second counts, was so fundamental as to render the sentence void on collateral attack.

STATUTE INVOLVED

Section 197 of the Criminal Code (18 U. S. C. (1946 ed.) 320, now 18 U. S. C. 2114) provided:

> Whoever shall assault any person having lawful charge, control, or custody of any mail matter or of any money or other property of the United States, with intent to rob, steal, or purloin such mail matter, money, or other property of the United States, or any part thereof, or shall rob any such person of such mail matter, or of any money, or other property of the United States, or any part thereof, shall, for the first offense, be imprisoned not more than ten years; and if in effecting or attempting to effect such robbery he shall wound the person having custody of such mail, money, or other property of the United States, or put his life in jeopardy by the use of a dangerous weapon, or for a subsequent offense, shall be imprisoned twenty-five years.

STATEMENT

On May 28, 1946, petitioners were indicted in the District Court for the Western District of Missouri in three counts for the robbery of a post office and conspiracy (R. 1–3, 6). As to petitioners Bent and Jones, the charges in the first two counts were as follows (R. 1–3):

> *Count I*—On or about the 2nd day of January, 1946, at Kansas City, Missouri, Joseph F. Bent and William Amos Jones did rob Luther H. Kieffer, clerk in charge of Contract Station No. 44 of Kansas City, Missouri Post Office, located at 5744 Prospect, of One Hundred Twenty-nine Dollars ($129.00) in lawful money belonging to the United States, said money being then and there in the custody of the said Luther H. Kieffer.
>
> *Count II*—That on or about the 2nd day of January, 1946, at Kansas City, Missouri, Joseph F. Bent and William Amos Jones did, by the use of a dangerous weapon, put in jeopardy the life of Luther H. Kieffer, clerk in charge of Contract Station No. 44 of Kansas City, Missouri Post Office, located at 5744 Prospect.

In each of these two counts a third defendant, Collins, was alleged to have aided and abetted petitioners. The third count involved all three defendants and charged a conspiracy to commit the robbery.

All the defendants first pleaded not guilty. Later, however, petitioners changed their pleas

on counts 1 and 3 to guilty and reserved their pleas on the second count until after the trial of Collins. Collins was acquitted after trial before the court without a jury. Petitioners then pleaded not guilty to count 2, waived a jury, and after trial were found guilty by the court. (R. 7.) On July 10, 1946, petitioners were each sentenced to imprisonment for the mandatory period of twenty-five years on the second count, and one year and a day on each of the other two counts to run concurrently with the sentence on the second count (R. 3–5). They did not appeal (see R. 18).

On September 13, 1948 (R. 8), after the sentences on counts 1 and 3 had expired, petitioner Bent filed a "motion to correct sentence" (R. 5–6). In substance, he contended that count 2 stated no offense against the United States. The District Court on December 3, 1948, held this count to be fatally defective, vacated the sentences, and ordered that petitioners be discharged from custody (R. 6–10).

On appeal by the Government, the Court of Appeals for the Eighth Circuit reversed the order of the District Court and directed it to order that petitioners be apprehended and restored to proper custody (R. 23–24).

ARGUMENT

At the outset, it is to be noted that the statute under which petitioners were indicted and con-

victed defines two offenses: (1) assaulting any person having lawful charge of mail matter or property of the United States with intent to rob, and (2) robbing any such person of such mail matter or property. The second part of the statute increases the penalty to a mandatory twenty-five years if, in attempting or effecting such a robbery, the defendant wounds the custodian or puts his life in jeopardy by the use of a dangerous weapon. The latter provision has been held not to create a separate offense, but to prescribe the conditions under which the penalty will be increased if either of the two offenses is committed in the aggravated form described by the statute. *Rowan* v. *United States,* 281 Fed. 137 (C. A. 5), certiorari denied, 260 U. S. 721; *Costner* v. *United States,* 139 F. 2d 429 (C. A. 4).

Petitioners' argument seems to boil down to the propositions that (1) no offense was stated in count 2 and (2) each count must stand on its own. They therefore conclude that the twenty-five-year sentence under count 2 must fall.

It is probably true that this count was faultily drawn and would have been open to direct attack. Obviously, it should have incorporated a reference to the robbery charged in the first count, because as it stands it merely charges that the defendants put the life of the postal clerk in jeopardy by the use of a dangerous weapon. It does not allege that this was done in effecting the robbery. But we believe that, as stated by

the Court of Appeals (R. 22), decision of the issue presented by the motion in the District Court should be governed by realities. The court referred to Rule 52 (a) of the Rules of Criminal Procedure as supporting this view. That Rule provides that "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

It is true that ordinarily each count of an indictment should stand on its own except as it may incorporate allegations from another by reference. *Dunn* v. *United States,* 284 U. S. 390, 393; *Hood* v. *United States,* 43 F. 2d 353, 354 (C. A. 10). Yet this is not true in all cases. In *Dimmick* v. *Tompkins,* 194 U. S. 540, 551, this Court said:

> Although for some purposes the different counts in an indictment may be regarded as so far separate as to be in effect two different indictments, yet it is not true necessarily and in all cases.

Under the test of effect upon petitioners' substantial rights, we think it is clear that they were in no wise prejudiced by the technically faulty indictment. The indictment referred to the statute and petitioners must have known that the purpose of the second count was to charge the aggravated degree of the robbery clearly alleged in the first. They pleaded guilty to the first and third counts, obviously because they had no defense to them. As the Court

of Appeals stated (R. 22), "Their pleas of not guilty to the second count were, doubtless, induced by the fact that whether they were convicted on that count after trial or on a plea would make no difference, since the court, by virtue of the statute, would, in any event, have to impose a sentence of 25 years imprisonment." That petitioners were under no misapprehension and clearly understood the charges against them is further evidenced by their failure to challenge the sufficiency of the second count either in the trial court or by way of appeal. In these circumstances we think the case comes within the principle so aptly stated in *Lucas* v. *United States,* 158 F. 2d 865, 867 (C. A. 4), certiorari denied, 330 U. S. 841:

> If the question of the sufficiency of the indictment had been raised upon the trial by demurrer, motion to quash or motion for bill of particulars and had been presented by appeal from the judgment, a new trial would doubtless have been granted for error in the proceedings. A very different situation is presented, however, where the question is not raised upon the trial; for it is well settled that, where this is not done, the indictment must be held sufficient, "unless so defective that by no reasonable construction can it be said to charge the offense for which the defendants were convicted." *Muench* v. *United States,* 8 Cir., 96 F. 2d 332, 334–335.

Here there is not even an allegation as to how the petitioners were in any way misled or otherwise prejudiced by the form of the indictment. While it is true that petitioners were erroneously sentenced under both of Counts I and II, as though they stated separate offenses, petitioners have not been prejudiced because their sentences under Count I ran concurrently with the mandatory 25-year sentences under Count II.

The court below rightly concluded that there is "no logic or justification in punishing poor, but nonprejudicial, criminal pleading" (R. 23) by releasing petitioners from service of the mandatory sentences imposed for an offense of which they were fairly convicted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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